UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

SENATOR RON JOHNSON, et al. Plaintiffs v. U.S. OFFICE OF PERSONNEL MANAGEMENT, et al. Defendants	)	Case No. 14-C-09

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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PRELIMINARY STATEMENT

The plaintiffs' grievance is that health-coverage benefits are being made available to Members of Congress and congressional staff that are more generous than the plaintiffs believe the law allows. This is not a dispute that can properly be heard by this Court, because Article III of the Constitution limits federal courts to hearing concrete "cases and controversies" and bars them from ruling on abstract legal or political debates. A key implication of this "case or controversy" limitation is the jurisdictional requirement of standing, which demands that every plaintiff seeking to challenge Government action in federal court must show from the outset that the challenged Government action causes him a concrete, personal injury that will be remedied if the court rules in his favor. Senator Johnson and plaintiff Ericson cannot demonstrate standing, because they are not harmed in any material way by the provision of optional health-coverage benefits to themselves or other Members of Congress and congressional staff. Consequently, this action should be dismissed for lack of subject matter jurisdiction.

Senator Johnson and plaintiff Ericson seek to challenge certain regulations published by the United States Office of Personnel Management (OPM) in October 2013 pertaining to the health-coverage options made available to Members of Congress and their official office staff under the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18032(d)(3)(D). The plaintiffs do not maintain that these regulations have any adverse effect on their own health coverage. Rather, they allege that they have standing to challenge the OPM regulations based on three other kinds of injuries that they claim to suffer because of the OPM regulations. But none of the plaintiffs' various theories describes the kind of injury that is needed to establish standing under the standards established by the Supreme Court and the Seventh Circuit.

The plaintiffs first claim they are injured by the OPM regulations because the regulations contravene the requirements of the ACA and thereby make the plaintiffs "complicit" in violations

of law. But the Supreme Court and the Seventh Circuit have held in case after case that personal indignation at a perceived violation of law is not the kind of injury that can support standing.

Alternatively, the plaintiffs assert that the OPM regulations threaten Senator Johnson's "credibility and reputation" among his constituents because they will generate public resentment against public officials generally. Such an allegation cannot support standing; indeed, the Seventh Circuit has previously held that public officials cannot establish standing based on the possibility of harm to their credibility. Moreover, this allegation does not describe an immediate injury that is directly attributable to the OPM regulations. Instead, it describes an abstract injury that might or might not occur depending on how third parties (Senator Johnson's constituents) perceive and react to OPM's regulations.

Finally, the plaintiffs suggest that they are injured by the OPM regulations because each Member of Congress is responsible for identifying which of his employees are employees of the Member's "official office" for purposes of the ACA. This does not establish standing to bring this action, for at least three reasons. First, the need to categorize employees does not arise from the OPM regulations; it arises from the terms of the statute, which restrict health-coverage options for "official office" employees, but not other employees. An order invalidating OPM's regulations would not eliminate the need for Members of Congress or other congressional offices to identify "official office" employees. Second, any burden associated with classifying employees is not an injury for purposes of Article III standing, because Members are not compelled to provide classifications—Members can delegate the task to the House or Senate Administrative Offices, and there is no threat of penalties or other adverse consequences falling on a Member of Congress or congressional staff member who does not participate in classifying employees. Finally, even if the need to classify employees somehow could be viewed as a

concrete injury attributable to the OPM regulations, the plaintiffs would have standing only to seek relief from that particular aspect of OPM's regulations, not to challenge OPM's regulations in their entirety. The Supreme Court has made clear that standing is not "dispensed in gross," Davis v. Fed. Election Comm'n, 554 U.S. 724, 734 (2008), and a plaintiff must separately demonstrate standing for each claim and request for relief in his complaint.

Because the plaintiffs cannot establish standing as required by Article III of the Constitution, the Court should dismiss this action for lack of subject matter jurisdiction.

BACKGROUND

I. The role of the Office of Personnel Management in administering employment benefits for Congress and congressional employees

The Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U.S.C. §§ 8901–8914, "establishes a comprehensive program of health insurance for federal employees" and "assigns to [the Office of Personnel Management (OPM)] responsibility for negotiating and regulating health-benefits plans for federal employees," Empire HealthChoice Assurance, Inc., v. McVeigh, 547 U.S. 677, 682–83 (2006). The class of "federal employees" covered by the FEHBA includes, among others, Members of Congress and congressional employees. 5 U.S.C. § 8901(1)(B)–(C). The FEHBA authorizes OPM to "prescribe regulations necessary to carry out" its provisions. Id. § 8913(a).

II. Provisions in the Patient Protection and Affordable Care Act affecting health-care coverage options for Members of Congress and congressional employees

In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), to expand access to affordable health care and to improve the functioning of the national market for health care by regulating the terms on which insurance is offered, controlling costs, and rationalizing the timing and method of payment for health care services.

Before the ACA went into effect, Members of Congress and congressional staff, like most other federal employees, could opt for coverage under health plans negotiated by OPM under sections 8902, 8903, and 8903a of the FEHBA, 5 U.S.C. §§ 8902, 8903, 8903a. However, the ACA imposed new restrictions on the health-coverage options that the Federal Government can make available to Members of Congress and certain congressional staff, as follows:

> (D) Members of Congress in the Exchange
>
> > (i) Requirement
> >
> > > Notwithstanding any other provision of law, after the effective date of this subtitle, the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are—
> > >
> > > > (I) created under this Act (or an amendment made by this Act); or
> > > >
> > > > (II) offered through an Exchange established under this Act (or an amendment made by this Act).
> >
> > (ii) Definitions
> >
> > > In this section:
> > >
> > > (I) Member of Congress
> > >
> > > > The term "Member of Congress" means any member of the House of Representatives or the Senate.
> > >
> > > (II) Congressional staff
> > >
> > > > The term "congressional staff" means all full-time and part-time employees employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC.

42 U.S.C. § 18032(d)(3)(D).

Under this provision, health plans made available to Members of Congress and to congressional staff within a Member's "official office" are restricted to plans that are either

"created under" the ACA or are "offered through an Exchange established under" the ACA. Id. § 18032(d)(3)(D)(i), (ii)(II). However, the statute preserves a role for the Federal Government in making these plans available—the plain terms of § 18032(d)(3)(D)(i) specify that "the Federal Government . . . may make available" the specified categories of health plans (emphasis added).

Congressional personnel who are not subject to § 18032(d)(3)(D)—that is, congressional personnel who are not themselves Members of Congress and are not classified as employees of a Member's "official office"—remain eligible to participate in Federal Employees Health Benefits (FEHB) plans administered by OPM, just as they were before § 18032(d)(3)(D) went into effect.

III. The regulations published by the Office of Personnel Management on October 2, 2013

On August 8, 2013, OPM published a notice of proposed rulemaking detailing how it proposed to adjust the provision of health plans to Members of Congress and their staffs in light of the requirements of § 18032(d)(3)(D) that limit Members and some staff to plans created under the ACA or offered through an Exchange established under the ACA. Federal Employees Health Benefits Program: Members of Congress and Congressional Staff, 78 Fed. Reg. 48,337 (Aug. 8, 2013). After soliciting and reviewing public comments, OPM issued a final rule on October 2, 2013. Federal Employees Health Benefits Program: Members of Congress and Congressional Staff, 78 Fed. Reg. 60,653 (Oct. 2, 2013). Three aspects of the regulations published by OPM are pertinent to this lawsuit:

First, OPM noted that the ACA left intact the provisions of the FEHBA explicitly specifying that "Members of Congress" and "Congressional employees" are "federal employees" for purposes of FEHBA, 5 U.S.C. § 8901(1)(B)–(C). See 78 Fed. Reg. at 60,653. It further noted that plans made available to Members of Congress and "official office" staff remain "health benefits plans" for purposes of FEHBA, 5 U.S.C. § 8901(6). See 78 Fed. Reg. at 60,653.

Accordingly, the administration of health benefits plans provided to Members of Congress and "official office" staff still fall within the scope of some, though not all, of the provisions of FEHBA. 78 Fed. Reg. at 60,653.

Second, OPM noted that the statutory definition of "congressional staff" in § 18032(d)(3)(D)(ii)(II) gave rise to a need to identify which particular congressional employees are "employed by the official office" of a Member of Congress such that they are subject to the restrictions imposed by § 18032(d)(3)(D). See 78 Fed. Reg. at 60,653; see also 78 Fed. Reg. at 48,337–38 (noting, for example, that staff are often assigned to work partly as personal staff and partly as committee or committee leadership staff); Compl. ¶ 48 ("There are numerous employees of the legislative branch that serve in capacities other than as staff in the official offices of Members of Congress."). OPM decided that it would "leave those determinations to the Members or their designees, and will not interfere in the process by which a Member of Congress may work with the House and Senate Administrative Offices" to determine health-plan eligibility. 78 Fed. Reg. at 60,653; see also id. at 60,655–56 (to be codified at 5 C.F.R. § 890.102(c)(9)(ii)). OPM noted that Members of Congress also had the option of delegating authority to categorize staff members to the House or Senate Administrative Offices. 78 Fed. Reg. at 60,653.

Finally, OPM determined that Members of Congress and congressional employees falling within § 18032(d)(3)(D)—that is, personnel limited to plans created under the ACA or offered through an ACA Exchange—could receive Government contributions to health care premiums for health plans purchased through the DC Health Link Small Business Market, an ACA Small Business Health Options Program (SHOP) Exchange administered by the DC Health Benefit Exchange Authority. See 78 Fed. Reg. at 60,653–54; see also id. at 60,655–56 (to be codified at

5 C.F.R. §§ 890.201(d), .501(h)). The Department of Health and Human Services had issued guidance on September 30, 2013, stating that Members of Congress and "official office" staff subject to the restrictions in § 18032(d)(3)(D) could enroll in SHOP Exchanges. See U.S. Department of Health and Human Services, Center for Consumer Information and Insurance Oversight, Affordable Insurance Exchanges Guidance (2013), available at http://cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/members-of-congress-faq-9-30-2013.pdf. OPM's October 2013 final rule approved the DC Health Link Small Business Market as the appropriate SHOP for Members of Congress and "official office" staff.

IV. The plaintiffs' Complaint

The plaintiffs in this case are Senator Ron Johnson of Wisconsin and Brooke Ericson, a District of Columbia resident who serves as Legislative Counsel to Senator Johnson. Compl. ¶ 10. The plaintiffs filed this case on January 6, 2014, alleging that the OPM regulations published in October 2013 violate the standards of the Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, and the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs seek an order declaring the regulations unlawful and enjoining the defendants from implementing the regulations.

Notably, the plaintiffs are not contending that the challenged OPM regulations have any adverse effect on their own health coverage; indeed, the complaint does not state whether either of the plaintiffs even receives health coverage through their affiliation with Congress. Rather, the plaintiffs are challenging OPM's regulations because they believe that the regulations extend health-coverage benefits to Members of Congress and congressional employees that are more generous than the law allows. Thus, the plaintiffs' suit seeks to narrow the health-coverage options and benefits made available to themselves and other Members of Congress and congressional employees.

The plaintiffs assert that they are entitled to raise such a challenge for three reasons: First, they argue that the challenged OPM policy "imposes [a] responsibility on" Senator Johnson to make determinations about what employees are part of his "official office." Compl. ¶ 12. Second, the plaintiffs contend that because they believe that the ACA does not permit Members of Congress or congressional employees to obtain health insurance through SHOP Exchanges or to receive employer contributions (that is, Government contributions) to their health-plan premiums, OPM's regulations make them "complicit" in what they believe are violations of law. Compl. ¶ 13. Finally, the plaintiffs allege that OPM's regulations "harm[] Senator Johnson's credibility and relationships with his constituents" because the health-insurance options made available to Members of Congress and congressional employees will foster resentment among the public. Compl. ¶ 15.

ARGUMENT

I. Standards governing a motion to dismiss for lack of subject matter jurisdiction

"Federal courts are courts of limited jurisdiction," Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994), and a plaintiff seeking to invoke the jurisdiction of a federal court bears the burden of establishing that the court's exercise of jurisdiction is within the bounds of the Constitution and is authorized by statute. See id.

When a defendant raises an issue of subject matter jurisdiction, the court must resolve the jurisdictional issue before it proceeds to the merits of the plaintiffs' claims. See, e.g., Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 430–31 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) . . . ." (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93–102 (1998))); Scott Air Force Base Props., LLC v. Cnty. of St. Clair, 548 F.3d 516, 520 (7th Cir. 2008) ("'[I]t is axiomatic that a federal court must assure

itself that it possesses jurisdiction over the subject matter of an action before it can proceed to take any action respecting the merits of the action.'" (quoting Cook v. Winfrey, 141 F.3d 322, 325 (7th Cir. 1998))).

When a defendant contends in a motion to dismiss that the facts alleged in the plaintiffs' complaint are insufficient on their face to establish jurisdiction, the court generally does not consider materials outside the complaint in evaluating the motion. See, e.g., Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 443–44 (7th Cir. 2009) ("Facial challenges [to jurisdiction] require only that the court look to the complaint and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction."). However, the court may consider "documents incorporated into the complaint by reference[] and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). A court can also examine evidence beyond the complaint if "external facts call[] the court's jurisdiction into question." Apex Digital, Inc., 572 F.3d at 444.

II. The jurisdictional requirement of standing under Article III of the Constitution

The constitutional separation of powers, as embodied in Article III of the Constitution, restricts the subject matter jurisdiction of the federal courts to the resolution of specific "'cases' and 'controversies'" and prevents courts from taking action to address matters better suited to legislative or executive action. Allen v. Wright, 468 U.S. 737, 750 (1984). One manifestation of the "case or controversy" limitation is the requirement of "standing," which demands that any plaintiff in federal court show "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498–99 (1975) (internal quotation mark omitted). Standing entails three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (alterations in original) (footnote omitted) (citations omitted). These requirements can be stated more succinctly as "injury in fact, causation, and redressability." Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam) (citing id.). The plaintiff bears the burden of establishing each of the three elements. See Defenders of Wildlife, 504 U.S. at 561.

When a plaintiff asserts multiple claims, the plaintiff must show that he satisfies the requirements for standing with respect to each claim independently; establishing standing for one claim in the case does not excuse the plaintiff from having to establish standing for other claims. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 351–53 (2006) (explaining that "a plaintiff must demonstrate standing for each claim he seeks to press" and rejecting the notion that establishing standing for a single claim makes it unnecessary for a plaintiff to establish standing for other claims based on the same facts). Accordingly, the Court must separately examine whether the plaintiffs have standing with respect to each component of their challenge to the OPM rules at issue.

III. The plaintiffs' belief that OPM's rule lacks a legal basis is not the kind of "concrete and particularized" injury to a "legally protected interest" that is needed to establish standing.

The plaintiffs' doubts about OPM's rule comports with the law are not a valid basis for standing, because a "generalized grievance" about the legality of Government action, Lujan v.

Defenders of Wildlife, 504 U.S. 555, 575 (1992), is not the kind of concrete, personal injury needed to establish standing.

The Supreme Court and the Seventh Circuit have held time and again that a mere interest in seeing laws obeyed is not a "legally protected" interest that can support standing, and that personal offense or indignation at a supposed transgression of law is not a "concrete and particularized" injury under Article III. See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106–07 (1998) (noting that "vindication of the rule of law" is not the kind of interest that can support standing and further noting that "although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury"); Allen v. Wright, 468 U.S. 737, 754–55 (1984) (citing several cases holding "that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216–22 (1974) (holding that citizens lacked standing to challenge reservist status granted to Members of Congress); Cronson v. Clark, 810 F.2d 662, 664 (7th Cir. 1987) ("Indignation that the law is not being obeyed, sympathy for the victims of that disobedience, a passionate desire to do one's legal duty—none of these emotions, however laudable, sincere, and intense, will support a federal lawsuit."); Whitaker v. Ameritech Corp., 129 F.3d 952, 959 (7th Cir. 1997); Clay v. Fort Wayne Cmty. Schs., 76 F.3d 873, 879 (7th Cir. 1996); Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 465 (7th Cir. 1998) ("A purely ideological interest is not an adequate basis for standing to sue in a federal court . . . .").

Senator Johnson's position as a U.S. Senator does not render these settled principles of standing inapplicable. A Member of Congress seeking relief in federal court is subject to the same standing requirements as any other citizen and must demonstrate "injury in fact," Defenders of Wildlife, 504 U.S. at 560, in the same manner as any other citizen. See, e.g., Raines v. Byrd, 521 U.S. 811, 829–30 (1997) (holding that individual Members of Congress lacked standing to challenge a statute that authorized the President to cancel individual budget items); Illinois v. City of Chicago, 137 F.3d 474, 478 (7th Cir. 1998) (interpreting Raines as holding that "Members of Congress may not sue to vindicate their views of legislative powers," and holding that the state of Illinois could not establish standing to defend a state law in its capacity as a lawmaker); cf. Hollingsworth v. Perry, 133 S. Ct. 2652, 2662–63 (2013) (holding that although citizen proponents of a ballot proposition had played a special role in the enactment of a law, they nevertheless lacked standing to defend enforcement of the law after its enactment).[1]

Likewise, the fact that the plaintiffs are or may be eligible for health-coverage benefits under OPM's regulations is not enough, by itself, to establish standing to challenge the regulations. To establish standing, the plaintiffs would have to show that the challenged regulations harm them in a material way, such as by diminishing their health-coverage benefits. See, e.g., Foster v. Center Twp., 798 F.2d 237, 242–43 (7th Cir. 1986) (holding that a plaintiff who received food stamps did not have standing to challenge eligibility requirements for food stamps because she appeared to meet the requirements and therefore could not demonstrate that

[1] Senator Johnson did not vote for or against enactment of the ACA. He took office in 2013, after the ACA was enacted. In any event, under the cases cited above, having cast a vote for the enactment of a law would not establish standing to seek a court order directing compliance with the law.

the requirements caused her any direct injury). The plaintiffs have not alleged that the OPM rule diminishes their health-coverage options in any way.

IV. Allegations regarding supposed threats to Senator Johnson's "credibility and relationships" with constituents also do not establish standing.

The plaintiffs' suggestion that the OPM regulations will foster resentment against Congress and harm Senator Johnson's "credibility and relationships" with constituents also is not a basis for standing because this allegation describes a kind of harm that is not a proper basis for standing and, in any event, relies wholly on speculation about how third parties might react to Government policies.

The Seventh Circuit has previously held that public officials cannot establish injury based on possible public reaction to Government policies. In People Who Care v. Rockford Board of Education, School District No. 205, 171 F.3d 1083 (7th Cir. 1999), a magistrate judge ordered a school board to approve funding for compliance with a desegregation order. Three members of the board sought to intervene in the case to challenge the magistrate judge's order. They argued that approving funding as ordered would run contrary to election-campaign promises, and thus the order threatened to turn each of them "into another dissembling politician in the minds of his constituents." Id. at 1088–89. The Seventh Circuit found that this potential harm was not a valid basis for standing, id. at 1089, and further noted that "[a]n order to do something in one's official capacity does not create the kind of injury that can support a suit in federal court consistent with Article III's limitation of the judicial power of the United States to cases or controversies." Id.; see also Raines v. Byrd, 521 U.S. 811, 819 (1997) (noting that to support standing, an injury "must be legally and judicially cognizable," and not abstract or otherwise inappropriate for vindication through the judicial process).

Moreover, as noted above, a plaintiff seeking to challenge Government action must establish that he suffers an injury that is "'actual or imminent, not "conjectural" or "hypothetical,"'" and that the injury is "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (alterations in original). The plaintiffs' suggestion of a supposed threat to Senator Johnson's credibility fails both of these requirements because it relies on bald speculation about how third parties—Senator Johnson's constituents—will react to the OPM regulations. See, e.g., Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1152 n.7 (2013) (holding that suggestions about third parties' reactions to potential Government surveillance did not establish standing because they were primarily based on "conjecture" and did not establish injury "fairly traceable" to the challenged Government action).

V. The plaintiffs' voluntary participation in identifying employees who are subject to 42 U.S.C. § 18032(d)(3)(D) does not establish standing to challenge OPM's regulations.

The plaintiffs' voluntary involvement in identifying which employees in Senator Johnson's office are "official office" staff subject to 42 U.S.C. § 18032(d)(3)(D), and therefore limited to health plans created under the ACA or offered through an ACA Exchange, also does not establish standing to challenge OPM's regulations. As explained further below, the need for congressional offices to classify employees arises from the statute itself, not from OPM's regulations; the OPM regulations merely confirm that OPM will not disturb the employee classifications made by congressional offices. Furthermore, the task of classifying employees does not work a legal injury on the plaintiffs, because the plaintiffs are not compelled to classify employees—a Member can delegate authority to the House or Senate Administrative Office to classify his employees, and whether a Member opts to delegate that authority or not, there is no threat of penalties or other adverse consequences falling on a Member or congressional staff

member who does not participate in classifying employees. Finally, even if the task of classifying employees somehow could be viewed as a concrete injury attributable to OPM's regulations, that would only support a challenge to that particular aspect of OPM's regulations—it would not establish standing to challenge all of OPM's regulations relating to health coverage for congressional employees.

A. The need to distinguish "official office" staff from other congressional employees arises from the statute, not from any actions taken by OPM

The responsibility of identifying Senator Johnson's "official office" staff is not an injury that can support standing to challenge OPM's regulations, because the need to classify employees does not flow from the challenged OPM regulations. Rather, it is a product of the statute itself, which applies restrictions to the health plans made available to employees in the "official office" of a Member of Congress, but does not affect the health plans made available to other congressional employees, 42 U.S.C. § 18032(d)(3)(D)(ii)(II).

As explained in section II above, plaintiff seeking to challenge a Government action must demonstrate injury that is "fairly traceable" to the particular action being challenged and likely to be redressed by a favorable decision. In this case, the need to classify employees flows from the statutory distinction between "official office" employees and other employees. See id. OPM's October 2013 regulations do not create any additional need to categorize employees; OPM's regulation merely confirms that OPM will not disturb or contest the classifications made by Members of Congress or congressional offices. See 78 Fed. Reg. at 60,653; see also id. at 60,655–56 (to be codified at 5 C.F.R. § 890.102(c)(9)(ii)). Accordingly, any burden associated with classifying employees is not "fairly traceable" to the challenged OPM regulations. See, e.g., Raines v. Byrd, 521 U.S. 811, 830 n.11 (1997) (remarking that any harm Members of Congress suffered from the Line Item Veto Act was due not to the actions of Executive Branch officials but

to "the actions of their own colleagues in Congress in passing the Act"); Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 146 (D.C. Cir. 2012) (per curiam) (denying standing when the injuries asserted by the plaintiffs arose "not because of anything EPA did in the [challenged] Rules, but by automatic operation of the statute"), cert. granted in part on other grounds sub nom. Utility Air Regulatory Group v. EPA, 134 S. Ct. 418 (2013), and cert. denied, 134 S. Ct. 418 (2013), and cert. denied, 134 S. Ct. 468 (2013); Johnson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 719 F.3d 601, 606–07 (7th Cir. 2013) (concluding that a pension plan administrator lacked standing to sue the plan custodian for refusing to distribute funds because the injury to the plan administrator was caused not by the plan custodian but by a court order freezing the funds); Reid L. v. Ill. State Bd. of Educ., 358 F.3d 511, 516 (7th Cir. 2004) (holding that teachers lacked standing to challenge rules issued by the Illinois State Board of Education because the Board had been ordered by a federal court to implement the rules, and so any injury suffered by the teachers was caused not by the actions of the Board but by the court order).

Likewise, vacating the OPM regulations would not lift or ease the burden of identifying "official office" employees who are subject to 42 U.S.C. § 18032(d)(3)(D). As explained in Background section II above, congressional employees who are not subject to 42 U.S.C. § 18032(d)(3)(D) remain eligible to participate in Federal Employees Health Benefits (FEHB) plans administered by OPM under the FEHBA. See supra p. 5. Thus, even if OPM's October 2013 regulations were vacated entirely as the plaintiffs request, that would not eliminate the need for congressional offices to distinguish employees subject to the § 18032(d)(3)(D) restrictions from other employees who are not subject to the restrictions. Congressional offices would still need to classify their employees to determine which employees are eligible to participate in OPM-administered FEHB plans and which are not. Thus, the burden of categorizing employees

would not be "redressed by a favorable decision," Defenders of Wildlife, 504 U.S. at 561; see Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."); Templeton v. Comm'r, 719 F.2d 1408, 1412 (7th Cir. 1983) (holding that taxpayers lacked standing to challenge the constitutionality of a tax exemption for which they did not qualify because if the exemption were invalidated the taxpayers would still have to pay the tax, and so holding the exemption unconstitutional would not result in any material benefit to the taxpayers).

In short, the plaintiffs' claimed injury—the burden of identifying "official office" employees who no longer qualify for traditional FEHB health coverage benefits—is not caused by the OPM regulations that are the target of their challenge. The plaintiffs therefore cannot rely on this supposed injury as a basis for standing.

B. The burden of categorizing employees does not amount to a concrete injury under Article III because the plaintiffs are not compelled to take part.

A further reason why the plaintiffs cannot establish standing based on the claimed burden of classifying employees under the statute is that neither of the plaintiffs is required or compelled to participate in classifying employees. The OPM regulations do not purport to impose any mandatory duty on Members of Congress or their employees in this regard, and no penalties or other adverse consequences would fall on a Member of Congress or congressional employee who failed or refused to assist in classifying employees.

Courts have held that compulsory reporting and disclosure requirements qualify as injury for purposes of Article III standing, but they have done so only in cases where the requirements were mandatory and were backed by some form of governmental compulsion, such as penalties for noncompliance. See, e.g., Larson v. Valente, 456 U.S. 228, 241 (1982) (finding that a

compulsory disclosure requirement worked Article III injury because the plaintiffs could be barred from soliciting contributions if they failed to comply); Mueller v. Raemisch, 740 F.3d 1128, 1132 (7th Cir. 2014) (explaining that the basis for the plaintiffs' standing to challenge sex offender registration requirements was the threat of criminal prosecution for failure to comply with the requirements). That necessary element of compulsion is missing in this case. OPM's regulations do not purport to impose any mandatory duty on the plaintiffs, and the plaintiffs do not stand to face any penalties, disciplinary action, or other adverse consequences if they decline to participate in categorizing employees. Moreover, the OPM regulations specify that Senator Johnson is free to delegate authority to categorize employees to the Senate Administrative Office and thereby free himself and his staff entirely from any associated administrative burdens. See Federal Employees Health Benefits Program: Members of Congress and Congressional Staff, 78 Fed. Reg. 60,653, 60,653 (Oct. 2, 2013) ("Nothing in this regulation limits a Member's authority to delegate to the House or Senate Administrative Offices the Member's decision about the proper designation of his or her staff."). And if he finds that option unpalatable, he and plaintiff Ericson are also free to simply do nothing at all. As a result, he has not alleged the concrete injury necessary to establish standing under Article III.[2]

[2] The fact that no adverse action will be taken against the plaintiffs if they do not assist in categorizing employees also has a second consequence that is fatal to subject matter jurisdiction: given that there is no threat of enforcement, the plaintiffs' suit fails the jurisdictional requirement of ripeness. See, e.g., Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967) (explaining that the ripeness doctrine bars the courts from "entangling themselves in abstract disagreements over administrative policies" before those disagreements have crystallized into any concrete and material dispute between the parties); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990) ("[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [Administrative Procedure Act] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him."); Ind. Right to Life, Inc. v. Shepard, 507 F.3d 545, 550 (7th Cir. 2007) (holding that a (continued . . .)

C. Even if the plaintiffs had standing to seek relief from classifying employees, the plaintiffs still would not have standing to challenge any other aspect of OPM's regulations.

As explained in sections V.A and V.B above, the plaintiffs cannot establish standing based on the alleged burden of distinguishing "official office" employees from other employees, because the need to make such distinctions does not arise from OPM's actions and because the plaintiffs are not required to participate in classifying employees. However, even if the burden of classifying employees somehow could be considered a palpable injury attributable to OPM's regulations, the plaintiffs then would have standing only to seek relief from having to participate in categorizing employees. They still would lack standing to challenge any other aspect of OPM's regulations.

As explained in section II above, a plaintiff must establish standing independently for each claim and request for relief in his complaint. In Davis v. Federal Election Commission, 554 U.S. 724 (2008), for example, the Supreme Court observed that although the plaintiff had established standing to challenge a disclosure requirement imposed by one statutory provision, he still had to separately establish standing to challenge contribution limits imposed by a neighboring provision of the same statute, because "[s]tanding is not dispensed in gross." Id. at 733–34; see also, e.g., Mueller v. Raemisch, 740 F.3d 1128, 1131–33 (7th Cir. 2014) (finding that the plaintiffs had standing to challenge some aspects of a state sex-offender registration scheme but lacked standing to challenge other aspects of the same scheme). Applying these principles here, even if the plaintiffs somehow could establish standing to challenge some part of OPM's regulations because it gave rise to the claimed burden of categorizing employees, their standing would be limited in scope to challenging that part of the regulations alone. The plaintiffs would

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challenge to two canons of the Indiana Code of Judicial Conduct was not ripe because there was "no evidence of a real threat of enforcement").

not have standing to challenge other parts of OPM's regulations for which they had not demonstrated injury in fact, causation, and redressability.

CONCLUSION

Because the plaintiffs' complaint fails to allege any concrete and particularized injury attributable to the Office of Personnel Management regulations that the plaintiffs seek to challenge, this action should be dismissed.

Date: March 17, 2014

Respectfully submitted,

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